No. 77267-3

J.M. JOHNSON, J. (dissenting)—The last injurious exposure rule should apply to industrial injury claims, just as it does to occupational disease claims. Cowlitz Stud Company properly raised the last injurious rule to shift potential liability to Hampton Lumber. Petitioner Dana Clevenger, the Department of Labor and Industries (L&I), the industrial appeals judge or the Board of Industrial Insurance Appeals (Board) should have joined Hampton to determine the assignment of liability for Clevenger's worsened condition. The majority's conclusion is erroneous. I dissent.

Analysis

The "last injurious exposure rule" provides that an employer/insurer during the most recent exposure bearing a causal relationship to the employee's disability is liable for the entire amount of the award. *Gorman v. Garlock, Inc*., 155 Wn.2d 198, 216, 118 P.3d 311 (2005); *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 130, 814 P.2d 629 (1991). The rule simplifies proof in contested cases, avoiding problematic allocation of responsibility. L&I

codified the last injurious exposure rule for occupational disease cases at WAC 296-14-350.

The rule also allocates liability between the state fund and a self-insurer providing coverage under the Industrial Insurance Act, Title 51 RCW. *Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 311, 849 P.2d 1209 (1993). This court adopted the last injurious exposure rule for workers who suffered an "occupational disease," as defined by RCW 51.08.140, during consecutive employment covered by two or more insurers. *Tri*, 117 Wn.2d at 134-39.

Industrial Injuries and the Last Injurious Exposure Rule

The Court of Appeals explicitly adopted the last injurious exposure rule in an industrial injury case (versus an occupational disease case). *Champion Int'l, Inc. v. Dep't of Labor & Indus*., 50 Wn. App. 91, 93, 746 P.2d 1244 (1987) ("'an employee sustains a subsequent industrial injury which is found to be a 'new' injury, the insurer at risk at the time of the second injury is liable for all of claimant's benefits'" (quoting 4 Arthur Larson, Workmen's Compensation § 95.21 (1984))). *Champion* was cited by this court in *Tri* without any hint of disapproval. *See* 117 Wn.2d at 138-39.[1] The majority in

this case, however, ignores *Tri*'s discussion of *Champion*. Instead, it reads too much into a lone footnote. *See* majority at 7-8 (citing *Tri*, 117 Wn.2d at 140 n.13).

This court should explicitly apply the last injurious exposure rule for industrial injury cases. Contrary to the majority's contentions, justifications for the last injurious rule's application in the occupational disease context are relevant in the industrial injury context, where claimants have successive or incremental injuries that are difficult to allocate to claimants' successive places of employment. Applying the rule in such injury cases would ensure swift relief to injured workers by efficiently assigning liability and fulfilling a claimant's burden of proof. *See Tri*, 117 Wn.2d at 136-38. Such a practical approach precludes mandatory identification of all previous employers and their respective insurance companies, as well as the often impossible task of

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[1] As this court stated in *Tri*:

> The Court of Appeals has also adopted the last injurious exposure rule. In *Champion*, a worker suffered two on-the-job injuries. One occurred while the employer was state insured, and the other while the employer was self-insured. In holding the employer liable for the cost of vocational retraining, the court rejected apportionment and applied the last injurious exposure rule.

117 Wn.2d at 138-39 (citations omitted).

apportioning exposure (in terms of both degree and of time) for each employer. *See id*.

Defensive Use of the Last Injurious Exposure Rule

The Court of Appeals correctly held that in applying the last injurious exposure rule, the superior court simply allocated responsibility between covered employment insurers. *Cowlitz Stud Co. v. Clevenger*, 127 Wn. App. 542, 552, 112 P.3d 516 (2005). The majority errs in reversing that holding. This "defensive" function of the last injurious exposure rule springs from its liability assignment aspect. Permitting an employer to raise the last injurious exposure rule to shift liability to a subsequent employer is consistent with a fair and consistent application of the rule. While results of the last injurious exposure rule may "appear unfair in a specific case, its benefit is that the costs will be spread proportionately among insurers over time by the law of averages." *Tri*, 117 Wn.2d at 136 (citing *Runft v. SAIF Corp.*, 303 Ore. 493, 500, 739 P.2d 12 (1987)).

Once an insurer gives an injured worker notice that it intends to raise the last injurious exposure rule as a defense, the worker (or L&I) should be able to file against the defensively named employer pursuant to WAC 296-14-

420(1).[2] The Board has authority to join the nonparty employer and to order payment of benefits pending resolution of the appeal. The worker will be relieved of the burden of establishing liability and will receive full benefits pending assignment of liability. WAC 296-14-420(2).

Here, L&I reopened Clevenger's 1997 claim effective May 30, 2000. Cowlitz Stud did not protest that order or L&I's January 8, 2001, order to pay Clevenger time loss benefits for parts of July and August 2000, presumably in part because their costs were low. But Cowlitz Stud did protest when L&I issued an April 5, 2001, order directing it to pay Clevenger under the reopened claim for January 16, 2001, through April 4, 2001, and to address long-term employability concerns. In protesting the order, Cowlitz Stud told Clevenger to file a new claim against Hampton, which would shift responsibility for payment of benefits to Hampton and the state fund. Clevenger declined.

Cowlitz Stud should be permitted to raise the last injurious exposure

[2] WAC 296-14-420(1):

> Whenever an application for benefits is filed where there is a substantial question whether benefits shall be paid pursuant to the reopening of an accepted claim or allowed as a claim for a new injury or occupational disease, the department shall make a determination in a single order.

rule in challenging L&I's April 5, 2001, order directing Cowlitz Stud to pay compensation under the reopened claim. L&I's May 30, 2000, order to reopen Clevenger's claim is a determination that her injury-related condition has worsened. But that reopening order should not preclude contests bearing on the extent of the worsened condition and subsequent disability awards made by L&I.

Remand and Joinder of Indispensable Party

Upon Cowlitz Stud's protest and appeal of L&I's order of April 5, 2001, it was incumbent upon L&I (and the industrial appeals judge) to join Hampton as an insurer who may be liable. "It is a rule of law, as old as the law itself, that a court cannot adjudicate the rights of parties who are not actually or constructively before it, with an opportunity to defend or maintain their rights in action." *State ex rel. Reed v. Gormley*, 40 Wash. 601, 603, 82 P. 929 (1905). L&I made an initial determination on Clevenger's worsened injury-related condition.[3] Remand to the Board with an order to join

[3] *See Callihan v. Dep't of Labor & Indus.*, 10 Wn. App. 153, 156, 516 P.2d 1073 (1973):

> if [the Board] finds that the department has by order made the initial determination of the injured person's claim, it then proceeds to process the appeal by conducting a de novo hearing of the claim, either by itself or through an examiner, ultimately entering findings and a decision on the merits.

Hampton for a de novo hearing is appropriate.[4]

Conclusion

I disagree with the majority's ruling that the last injurious exposure rule does not apply to industrial injury cases. The reasons prompting the rule dictate it be applied to all claims. Cowlitz Stud properly raised the last injurious exposure rule to shift liability to Hampton. This case should be remanded to the Board of Industrial Insurance Appeals to join Hampton and conduct a hearing to determine the liability for Clevenger's worsened

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[4] WAC 263-12-145(4):

> After review of the record, the board may set aside the proposed decision and order and remand the appeal to the hearing process, with instructions to the industrial appeals judge to whom the appeal is assigned on remand, to dispose of the matter in any manner consistent with chapter 263-12 WAC.

Absent clear statutory directive, this court should refrain from remanding a case or controversy to any entity other than a constitutionally prescribed court of law. Here, operation of RCW 51.52.115 suggests we remand to the Board for fact-finding purposes. RCW 51.52.115 provides, in pertinent part:

> Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board. The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court as provided in RCW 51.52.110.

condition. I dissent.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Justice Richard B. Sanders